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In The

Supreme Court of the United States

October Term, 1974

No. 74-986

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Petitioner,

v.

EARLE G. PAYNTER, JR.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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February 6, 1975

TABLE OF CONTENTS

Page

OPINION BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED 2

STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 3

The Statement Relating To 45 U.S.C. § 56 and Rule 6(a) 4

The Statement Relating To Due Process 5

THE REASONS FOR GRANTING THE WRIT 9

This Action Was Barred By 45 U.S.C. § 56 Notwithstanding Rule 6(a) FRCP 10

Certiorari Should Be Granted To Satisfy Due Process 13

CONCLUSION 16

APPENDIX A 17

1. United State Code, Title 45, § 56 17
2. United States Code, Title 28, Rule 6(a) Federal Rules of Civil Procedure 17

APPENDIX B 18

1. Order December 6, 1974, U.S Court of Appeals, Fourth Circuit 18
2. Per Curiam Opinion, October 4, 1974, U.S. Court of Appeals, Fourth Circuit 19
3. Judgment, December 12, 1973, U.S. District Court, Western District of Virginia 20

Page

4. Ruling On Motion To Dismiss, June 15, 1973, U.S. District Court, Western District of Virginia 21

TABLE OF CITATIONS

Cases

Aboussie v. Aboussie (C.A. 5), 441 F.2d 150, 157 (1971) 12

Bellegarde Custom Kitchens v. Leavitt (Me.), 295 Atl. 2d 909 (1972) 12

Bowling v. Webb Gas Co., Inc of Lebanon (Mo.), 505 S.W.2d 39 (1974) 12

Brown v. Porter (Mich.), 163 N.W.2d 709 (1968) 12

Burnett v. New York Central R. Co., 380 U.S. 424, 13 L. Ed.2d 941, 85 S.Ct. 1050 (1965) 12

Davis v. U.S. F&G Co. (Ga.), 167 S.E.2d 214 (1969) 12

Inman v. Baltimore & O. R. Co., 361 U.S. 138, 4 L. Ed.2d 198, 89 S.Ct. 242 (1959) 13

Joint Council, etc. v. Delaware L&W R. Co. (C.C.A. 2), 157 F.2d 417, 420 (1946) 11, 12

Montana v. Kennedy, 366 U.S. 308, 66 L. Ed.2d 313, 81 S.Ct. 1336 (1961) 13

Neil v. Biggers, 409 U.S. 188, 84 L. Ed.2d 401, 93 S.Ct. 375 (1972) 13

Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, 301 U.S. 292, 81 L. Ed. 1093, 57 S. Ct. 724 (1937) 13

Perma Life Mufflers v. International Parts, 392 U.S. 134, 20 L. Ed.2d 982, 88 S.Ct. 1981 (1968) 13

Romaine v. State Farm Mut. Auto Ins. Co. (Nev.), 485 P.2d 102 (1971) 12

Page

Sibbach v. Wilson & Co., 312 U.S. 1, 85 L. Ed. 479, 61 S.Ct. 422 (1940) 11

Street v. United States, 133 U.S. 299, 33 L. Ed. 631, 10 S.Ct. 309 (1890) 10

Union National Bank v. Lamb, 337 U.S. 38, 98 L. Ed. 1190, 69 S.Ct. 911 (1949) 10

Washington v. U.S., 357 U.S. 348, 2 L. Ed.2d 1368, 78 S.Ct. 1373 (1958) 13

Wilkerson v. McCarthy, 336 U.S. 53, 93 L. Ed. 497, 69 S.Ct. 413 (1949) 14

Williams v. Lee, 358 U.S. 217, 3 L. Ed.2d 251, 79 S.Ct. 269 (1959) 14

Statutes

28 U.S.C., Federal Rules of Civil Procedure, Rule 6(a) ..3, 4, 11, 17

28 U.S.C. § 1254(1) 2

45 U.S.C. § 56 ..... 3, 4, 17

45 U.S.C., Chap. 1, §§ 1-16 3

45 U.S.C., Chap. 2, §§ 51-60 3

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, The Chesapeake and Ohio Railway Company, respectfully prays that a writ of certiorari issue to review the judgment and *per curiam* opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on October 24, 1974, in which rehearing was denied on December 6, 1974, affirming judgment of the United States District Court for the Western District of Virginia entered December 13, 1973.

OPINION BELOW

The two sentence *per curiam* opinion of the Court of Appeals (R. 3-4), not yet reported, and judgment on the peti-

tion for rehearing *en banc* (R. 1), appear in Appendix B herewith (infra, pp. 18-19). No opinion was rendered by the District Court for the Western District of Virginia. The written ruling of the District Court on the railroad's motion to dismiss this action because barred by 45 U.S.C. § 56 and its final judgment (Joint Appendix with Record, pp. 43-44, 69), appear in Appendix B herewith (*infra*, pp. 20-23).

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on October 24, 1974. A timely petition for rehearing *en banc* pursuant to Rule 35 Federal Rules of Appellate Procedure was filed on November 6, 1974 and was denied on December 6, 1974. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether Rule 6(a), Federal Rules of Civil Procedure, extends the positive limitation for bringing an FELA action provided by 45 U.S.C. § 56 so that the action filed in this case on March 22, 1971 alleging an accident on March 19, 1968 is not barred by 45 U.S.C. § 56.

2. Whether the refusal of the District Court for the Western District of Virginia to enter final judgment for the C&O, or at least to grant a new trial, because of the insufficiency of evidence and the multitude of prejudicial error, and the two sentence *per curiam* affirmance of the District Court judgment thereon by the Court of Appeals for the Fourth Circuit constitute such a departure by the District Court from the accepted and usual course of judicial proceedings and the sanctioning of such departure by the Court

of Appeals as to deprive the petitioner of due process and call for the supervision of this Court.

STATUTORY PROVISIONS INVOLVED

1. Title 45, United States Code, § 56.

The statute provides that "no action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued."

The full text of the statute appears in Appendix A herewith (*infra*, p. 17).

2. Title 28, United States Code, Federal Rules of Civil Procedure, Rule 6(a).

The rule provides that "In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the next day which is not a Saturday, a Sunday, or a legal holiday."

The full text of the rule appears in Appendix A herewith (*infra*, p 17).

STATEMENT OF THE CASE

This action was brought March 22, 1971 under 45 U.S.C., Chap. 2, Sect. 51-60 and 45 U.S.C., Chap. 1, Sects. 1-16, by a retired yard conductor of the petitioner claiming a low back strain when he ran and threw a switch in the Smith Creek Yard of the Chesapeake and Ohio Railroad at Clifton Forge, Virginia, about 1:00 p.m. during the morning work shift of March 19, 1968.

The district court refused not only final judgment for the C&O but also a new trial to correct the multitude of prejudicial errors appearing from the succeeding statement of the case. The Court of Appeals affirmed the district court judgment by the following *per curiam* opinion, the rehearing of which it also denied.

> "On consideration of the record, briefs and oral argument, we find no reversible error. We find sufficient evidence to take the case to the jury." (Appendix B, *infra*, p 19)

The transcript of the record in this case contains a printed Joint Appendix that includes all parts of the record in the District Court for the Western District of Virginia designated by both parties on the appeal from the judgment of that court to the Court of Appeals for the Fourth Circuit duly certified as a part of the record below pursuant to Rule 21(2) of this Court.

The Statement of the Case will be made in two parts because of the two Questions Presented, each part relating to that particular Question Presented. References to the printed Joint Appendix record will be made for convenience by the letters "J.A." and to the remainder of the certified record by the letter "R." The parties will be designated as "C&O" and "Paynter."

The Statement Relating To 45 U.S.C. § 56 And Rule 6(a)

C&O filed its motion to dismiss the complaint (J.A. 6) and the amended complaint (J.A. 37) on the ground that the action was brought more than three years after the cause of action accrued. The complaints alleged that, though he was actually injured on March 19, 1968, Paytner did not know until March 22, 1968, or thereafter, that he had been so injured on March 19, 1968 (J.A. 11, 14).

The District Court filed a written ruling on the motion to dismiss deciding that the action was brought within the three year period because of Rule 6(a), FRCP (J.A. 43-44, *infra*, pp. 21-23).[1]

The question whether Rule 6(a) extended the limitation of 45 U.S.C. § 56 was argued to the Court of Appeals in briefs, orally and in the Petition to Rehear *en banc*[2] as a matter of national importance affecting due process in FELA cases.

The Statement Relating To Due Process

Paynter was the yard conductor of a crew kicking cars through the switch involved to assemble train No. 95 (J.A. 156-159). As conductor it was Paynter's duty to see that the switch was properly aligned before he permitted any car to be set in motion (J.A. 189-191, 86). Failing in that duty, he suddenly saw that a particular car had begun to roll when the switch was not properly aligned and he consequently ran some 50 feet across the tracks and grabbed the switch to throw it hurriedly in order to avoid a wreck. When so doing he felt pain in his back (J.A. 190-191, 192-193).

Counsel for Paynter conceded, and the District Court correctly charged, that the condition of the switch at the time the alleged accident occurred was the issue in the case (J.A. 217, 75). The first witness called by Paynter to testify concerning that issue did not know the condition of the

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[1] That ruling also indicated that it could be said that the cause of action did not accrue until March 20, 1968, when Paynter originally claimed that he first became aware of his injury (J.A. 45). At trial after that ruling, however, Paynter repudiated that earlier contention and testified that he did in fact know of his alleged injury on the day it was claimed that it occurred and that he specifically so told his crew members of it on that day (J.A. 162-163, 121).

[2] See paragraph 2, page 2 of that petition.

switch at that time because he did not recall whether he had worked on March 19, 1968. On that account he was asked to state its condition before March 19, 1968 (J.A. 74). On objection by C&O that the testimony should be restricted to the condition of the switch on March 19, 1968 (J.A. 74) the District Court told the jury:

> "I'll overule the objection. I think it might be beneficial to the jury in determining what the condition of the switch was at the time that the alleged accident occurred.
>
> "Ladies and Gentlemen of the jury, the question you will have to decide is the condition of the switch at the time that the alleged accident occurred. Now, the condition of it before or afterwards might be beneficial to you in determining what the condition was at the time the alleged accident occurred; and for that reason, I'm gonna overrule the objection and let him answer." (J.A. 75).

Paynter offered the testimony of six fellow employees in addition to himself concerning the concededly simple issue in the case, viz., the condition of the switch on March 19, 1968. Not one of them was able to say what the condition of the switch was on that day of the alleged accident (J.A. 74, 78, 86, 122, 127, 128-129, 132, 137, 142, 148, 151, 152).

Those witnesses, however, testified uniformly that when the switch was swept and cleaned it "worked as it should," operated "very good," "gives safety to the operation," could be worked "without strain," and operated "fine" (J.A. 78-79, 94, 122, 128, 142, 149, 152). Those same men testified that when not swept and cleaned the switch did not "work as it should," was "pretty tight," could not be "operated without strain or undue exertion," was "rather hard to throw," and was " hard to throw" (J.A. 79, 94, 122, 128, 142, 149).

The true issue presented was, therefore, whether the switch was swept and cleaned on March 19, 1968, the day of the accident.

Paynter, himself, testified without contradiction that a railroad maintenance man cleaned the switches "every morning" (J.A. 161). He also offered uncontradicted and confirming proof by others that such regular morning sweeping and cleaning was a matter of "daily routine" (J.A. 147, 91, 133, 152). Paynter, himself, and his crew used the switch the morning of the alleged accident and it "worked all right then" (J.A. 159, 184-185).

Notwithstanding that uncontradicted evidence, the district court admitted testimony over the continued objection of C&O (J.A. 74-75, 77, 87-88, 90-91, 216) that for 22 years complaints had been made that the switches were not kept clean and were getting hard to throw, that it had been a tough switch to throw for 22 years (J. A. 79, 87, 93), that there was no maintenance of the switch on the night shift, that general complaints had been made about the switches for 30 years and that the switch was in improper working order on that account at all times on the night shift during that period (J.A. 127-129, 137), that during 18 years it had been necessary to strain in order to use the switch when not cleaned, that the Saturday evening before the accident it was in "foul shape" and that complaints were made during that period without any result (J.A. 147-149, 150-151).

The district court also refused to strike testimony by a witness who worked an average of only three times a week that the switch in question was not cleaned daily (J.A. 87-89).

The uncontradicted testimony was that sand in the switches was what made them "hard to throw" irrespective of type, whether ball-type or latch type, that there was no difference in the maintenance of each type, and that the

only difference in the two types of switch was that the ball type was closer to the ground requiring the operator to lean over further (J.A. 76, 78, 83, 84, 99, 100).

The district court refused to delete or to strike out the admittedly false testimony by deposition that the doctors who mistreated Paynter and aggravated his injury to the extent that it would not have been as serious and perhaps not have required surgery at all with proper treatment were C&O doctors at C&O hospitals and restricted any correction of that conceded inaccuracy to rebuttal proof that the treating doctors and hospitals were not C&O doctors and C&O hospitals. The admitted mistatement of fact remained as an issue before the jury as well as the prejudicial argument thereon by counsel (J.A. 238-239, 101-102, 106-108).

The C&O motion for directed verdict on the ground that Paynter's negligence was the sole proximate cause of the alleged injury was overruled (J.A. 194, 216, 217).

Argument to the jury by Paynter's counsel, based on the evidence objected to, included the following: that the Congress of the United States had declared to the citizens of the United States by adopting FELA that the Congress does not care what a railroad employee does wrong and that, when you sit on juries, "We don't care. He is entitled to recover" (J.A. 217); that for 35 years the C&O employees had continuously complained that the switch was not sufficiently cleaned and nothing had been done about it; that the switch had always been bad; that this was an accident waiting for 35 years to happen; that the railroad did not really care about its employees (J.A. 217-223); and, finally in closing, that the C&O had saved $600,000 over a 20 year period at the expense of its employees by not hiring enough men to keep the switches clean, which half million dollars was enough to give Paynter an adequate verdict (J.A. 224).

In its charge the district court required the jury to render special verdicts by answering six questions, notwithstanding the objection of both parties (J.A. 235, 236). Questions one through four called for yes or no findings as to C&O's negligence and, if yes, whether it contributed to the injury; as to Paynter's negligence and, if yes, whether it contributed to the injury. Question No. 5 inquired as to the percentage of Paynter's contributory negligence, if any was found. Question No. 6 demanded a finding of "the total amount of damages sustained by the plaintiff as a result of his injury" regardless of whether there was any finding whatever of liability, to which C&O expressly objected on that specific ground (J.A. 237-238, 66).

The jury found that Paynter was 20 percent the cause of his own injury and assessed the total damage at $125,540 on which judgment for $100,432 was entered (J.A. 66).

The district court declined the C&O motion to set aside the judgment and either enter final judgment for the C&O or grant a new trial for the errors assigned (J.A. 67-69). The Court of Appeals affirmed (R. 2, 3-4, Appendix B to this Petition, *infra*, pp. 18-19).

THE REASONS FOR GRANTING THE WRIT

It is nationally important to settle the conflict whether Rule 6(a), Federal Rules of Civil Procedure, extends the statutory limitation for bringing an FELA action prescribed by 45 U.S.C. § 56 as to which Courts of Appeal and State Courts are in conflict and which this Court has not specifically determined.

It is also nationally important to decide whether the Congress intended to abolish due process when it enacted FELA. We most respectfully submit that the Congress did not intend by FELA to abolish the absolute requirement for

proof of negligence as a cause of injury, even though contributing only in the slightest degree, by relevant, material and admissible evidence as a prerequisite to recovery.

The two questions presented will be separately argued.

This Action Was Barred By 45 U.S.C. § 56 Notwithstanding Rule 6(a) FRCP

The injury claimed in this case occurred on March 19, 1968. The FELA action was brought on March 22, 1971, more than three years thereafter (J.A. 3, 11, 43-44). The trial court concluded that Rule 6(a) FRCP extended that time because the last day of the three year period fell on a Saturday and the action was commenced on the following Monday (J.A. 44; Appendix B to this Petition, *infra*, pp. 21-23). The Court of Appeals for the Fourth Circuit found "no reversible error" in that ruling (Appendix B to this Petition, *infra*, pp. 18-19).

This Court had before it in *Union National Bank* v. *Lamb*, 337 U.S. 38, 93 L. Ed. 1190, 69 S. Ct. 911 (1949) the issue whether a petition for certiorari from the Supreme Court of Missouri docketed on Monday, December 13, 1948, was in time when the ninetieth day limit fixed by the revision of 28 U.S.C. § 2101, effective September 1, 1948, was a Sunday. Relying on the theory that Sunday was a *dies non* and on its decision in *Street* v. *United States*, 133 U.S. 299, 33 L. Ed. 631, 10 S. Ct. 309 (1890), the petition was accepted as timely

The opinion in *Lamb* recognized a definite conflict of decision among the Courts of Appeal regarding that effect of Sunday:

> "There is a contrariety of views whether an act which by statute is required to be done within a stated period may be done a day later when the last day of the

period fall on Sunday." (337 U.S. at 40; 93 L. Ed. at 1194, 69 S. Ct. at 912).

Of the seven decisions of Courts of Appeals cited in the footnote supporting that recognition of such conflict, five had then adopted a view contrary to the final conclusion of this Court in that case regarding the applicable effect of Sunday when it happens to be the last day of a statutory limitation.

The opinion in *Lamb* noted that Rule 6(a), FRCP gave expression to "considerations of liberality and leniency" similar to the policy of its decision in *Street* v. *United States* which the Court found applicable to the particular issue then before it, namely, the timelines of a petition for certiorari pursuant to 28 U.S.C. § 2101, inasmuch as that statute expressed no contrary policy.

The basis for the contrary view among the "contrariety of views" then existing and now continuing is well stated in *Joint Council, etc.* v. *Delaware, L&W R. Co.* (CCA 2), 157 F. 2d 417, 420 (1946) as follows:

> "Rule 6(a) is a rule of procedure relating to acts done or proceedings had after the commencement of action and to any statutes expressly applicable to such proceedings. It is not intended to modify and change existing statutes of limitation."

This Court expressly decided in *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 10, 85 L. Ed. 479, 483, 61 S. Ct. 422, 423-425 (1940) that the Act of June 19, 1934, authorizing promulgation of the Federal Rules of Civil Procedure "was purposely restricted in its operation to matters of pleading and court practice and procedure," by expressly providing that "said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigate." In deciding also that Rule 35, FRCP, relating to physical examination, was a

rule of procedure rather than one of substantive law, the test was said to be "whether a rule really regulates procedure" (312 U.S. at 14, 85 L. Ed. at 485, 61 S. Ct. at 426).[3]

In *Burnett* v. *New York Central R. Co.*, 380 U.S. 424, 13 L. Ed. 2d 941, 85 S. Ct. 1050 (1965), this Court undertook to examine the fundamental purposes underlying the objectives sought to be attained by statutes of repose and which render them preeminent rather than subject to being extended, waived or tolled. Asserting that the basic inquiry always is the congressional purpose and that mere classifications as "substantative" or "procedural" are not alone enough to determine whether a particular limitation may or may not be extended, the opinion appears to establish that the essential distinction, decisive "in the interests of justice" as to which objective outweighs the other, is whether the litigant has "slept on his rights" or has been prevented from asserting them. (380 U.S. at 428-429, 13 L. Ed. 2d at 946, 85 S. Ct. at 1055).

The general conflict of opinion, in varying aspects of the issue, continues in both state and federal courts.[4]

The specific question at bar is whether Rule 6(a), FRCP applies to 45 U.S.C. § 56. The answer is not so definitely settled by this Court that no conflict remains. The conuclusion of the Second Circuit in *Joint Council, etc.* v. *Delaware,*

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[3] Justice Frankfurter, dissenting with whom Justices Black, Douglas and Murphy agreed, was of the following definite opinion:

> "Plainly the Rules are not acts of Congress and can not be treated as such. * * *, to draw any inference of tacit approval from non-action by Congress is to appeal to unreality." (312 U.S. at 18, 85 L.Ed. at 487, 61 S.Ct. at 428)

[4] *Bowling* v. *Webb Gas Co., Inc. of Lebanon* (Mo.), 505 S.W.2d 39 (1974); *Bellegarde Custom Kitchens* v. *Leavitt* (Me.), 295 Atl. 2d 909 (1972); *Davis* v. *U.S. F&G Co.* (Ga.), 167 S.E.2d 214 (1969); *Brown* v. *Porter* (Mich.), 163 N.W.2d 709 (1968); *Romaine* v. *State Farm Mut. Auto. Ins. Co.* (Nev.), 485 P.2d 102 (1971); *Aboussie* v. *Aboussie* (C.A. 5), 441 F.2d 150, 157 (1971).

L&W R. Co., supra, that the rule does not so apply is the more reasonable and logical in the opinion of this petitioner. It is, however, important that the conflict be finally resolved, regardless of which decision the Court may make. The petition should therefore be granted, we respectfully submit.

Certiorari Should Be Granted To Satisfy Due Process

It is important to maintaining confidence in the judicial system that due process be meticulously observed. This Court has persisted in granting certiorari for that purpose, particularly to insure that a new trial is granted when it is probable that the prior one did not offer due process: in *Neil* v. *Biggers,* 409 U.S. 188, 84 L. Ed. 2d 401, 93 S. Ct. 375 (1972), to determine "whether the identification procedure violated due process" because "unnecessarily suggestive and conducive to irreparable mistaken identification"; in *Inman* v. *Baltimore & O. R. Co.,* 361 U.S. 138, 4 L. Ed. 2d 198, 89 S. Ct. 242 (1959), to ascertain whether the evidence was sufficient to establish "that negligence on the part of the railroad could have played" a part in petioner's injury; in *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio,* 301 U.S. 292, 81 L. Ed. 1093, 57 S. Ct. 724 (1937), to discover whether due process was violated "when rates previously collected were ordered to be refunded upon the strength of evidential facts not spread upon the record"; in *Montana* v. *Kennedy,* 366 U.S. 308, 66 L. Ed. 2d 313, 81 S. Ct. 1336 (1961), because of the harshness of decision when it was "readily apparent" that a Rule of the FRCP was not applicable; in *Perma Life Mufflers* v. *International Parts,* 392 U.S. 134, 20 L. Ed. 2d 982, 88 S. Ct. 1981 (1968), because the lower court rulings seemed to threaten the effectiveness of private action to enforce anti-trust procedure; in *Washington* v. *U.S.,* 357 U.S. 348,

2 L. Ed. 2d 1368, 78 S. Ct. 1373 (1958) to determine the sufficiency of evidence; in *Williams* v. *Lee*, 358 U.S. 217; 3 L. Ed. 2d 251, 79 S. Ct. 269 (1959), on account of doubt as to state court jurisdiction; in *Wilkerson* v. *McCarthy*, 336 U.S. 53, 93 L. Ed. 497, 69 S. Ct. 413 (1949), to determine the sufficiency of evidence.

The insufficiency and inadmissibility of evidence in this trial constitute such departure from the accepted and usual course of judicial proceedings as to preclude due process. The failure to correct such error on appeal, at the least by ordering a new trial under proper conditions, calls for appropriate supervision by this Court.

The sole issue in this case was conceded to be the condition of the switch at the time of the accident on March 19, 1968 (J.A. 75, 217). The sole duty of the C&O was to exercise ordinary care to have the switch in reasonably safe condition at that time. The testimony offered by Paynter established without dispute that the condition of the switch at any moment of time depended altogether on whether it was cleaned and swept and none of the six fellow-workers called by Paynter knew its condition in that regard at the time of the accident (J.A. 74, 78-79, 86, 94, 122, 127-129, 132, 137, 142, 148-149, 151-152). It is thus obvious that a switch whose condition, good or bad, is dependent upon whether it is swept or unswept clean of sand is not a facility of such continuing stable condition that testimony concerning its condition before and after an accident is admissible without concomitant reference to that essential factor admittedly determinative of its status at the particular time.

The uncontradicted proof offered by Paynter was that it was "daily routine" for the switch involved to be swept clean every morning (J.A. 161, 147, 91, 133, 152) and that when swept its condition was proper (J.A. 78-79, 94, 122, 128, 142, 149, 152). Paynter, himself, was unable to say whether

it had or had not been swept the morning of his accident, but he did say that he and his crew had used it that morning (J.A. 159) and that "it worked all right then" (J.A. 184-185). The presence of sand was entirely an assumption by Paynter rather than an observed fact (J.A. 160). There was no evidence whatever from actual observation that there was sand in the switch at the time of the alleged accident.

The repeated inadmissible testimony that the switches on the yard had not been kept clean and had been complained of without any result for 30 years or more was obviously rendered especially prejudicial by the district court's specific direction to the jury, upon objection, that "the condition of it (the switch) before or afterwards might be beneficial to you in determining what the condition was at the time the alleged accident occurred" (J.A. 75, 79, 87, 93, 127-129, 137, 147-149, 150).

The district court refused to strike out, but left as a prejudicial issue of fact for the jury to consider, the admittedly false testimony that the doctors claimed to have mistreated Paynter and thereby increased the severity and duration of his injury were C&O doctors in C&O hospitals for whom the C&O was responsible (J.A. 238, 184, 101-108).

The Court also insisted upon special verdicts, objected to by both parties, and refused over specific objection by C&O, to condition question No. 6, the fixing of a dollar value on the total injury claimed to have been suffered by Paynter, upon first finding that negligence of the C&O was a cause of the injury (J.A. 237-238, 235-236, 66).

The argument of Paynter's counsel, outlined above in the related Statement of the Case, was highly inflammatory and beyond the scope of relevant, material and admissible facts, that deliberately appealed to conjecture, surmise and sympathy as opposed to evidence to which the jury's consideration should have been restricted. That persuasive effort

was supported by a heavily weighted charge which emphasized the inferences permitted to be drawn improperly from evidence "produced in this Courtroom" because that evidence included the inadmissible testimony concerning the condition of the switch for 30 years or more and from circumstantial evidence justified by the jury's "own experiences" (J.A. 53, 54, 55).

The failure to recognize the insufficiency of the evidence in this case, and particularly the failure in any event to grant a new trial in order to ascertain a fair result without such accumulation of prejudicial errors, clearly violated due process and warrant the granting of this petition.

CONCLUSION

For the reasons hereinabove stated, this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A

1. United States Code, Title 45, § 56:

"No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States."

2. United States Code, Title 28, Rule 6(a), Federal Rules of Civil Procedure:

"In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule and in Rule 77(c), 'legal holiday' includes New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the district court is held."

APPENDIX B

1. The order of the Fourth Circuit Court of Appeals on the petition to rehear *en banc:*

United States Court of Appeals
For The Fourth Circuit

No. 74-1210

Earl G. Paynter, Jr.,

Appellee,

vs.

The Chesapeake and Ohio Railway Company,

Appellant.

Filed Dec. 6, 1974

William K. Slate, II
Clerk

Order

Upon consideration of the petition for rehearing, with its suggestion of a rehearing *en banc,* and with the concurrence of Judge Bryan and Judge Craven, no member of the Court having requested a poll of the Court,

IT IS ORDERED that the petition for rehearing be, and it is hereby, denied.

/s/ Clement F. Haynsworth, Jr.
Chief Judge, Fourth Circuit

A True Copy, Teste:

William K. Slate, II, Clerk
By /s/ Faye Chlome
Deputy Clerk

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2. The *Per Curiam* opinion of the Fourth Circuit Court of Appeals:

United States Court Of Appeals
For The Fourth Circuit

No. 74-1210

Earl G. Paynter, Jr.,

Appellee,

versus

The Chesapeake and Ohio Railway Company,

Appellant.

Appeal from the United States District Court for the Western District of Virginia, at Charlottesville.
James C. Turk, District Judge

Argued October 4, 1974 Decided October 24, 1974

Before Haynsworth, Chief Judge, Bryan, Senior Circuit Judge, and Craven, Circuit Judge.

Aubrey R. Bowles, Jr., (Aubrey R Bowles, III, on brief) for Appellant; Raymond H. Strople (Willard J. Moody and Bernard Miller on brief) for Appellee.

Per Curiam:

On consideration of the record, briefs and oral argument, we find no reversible error. We find sufficient evidence to take the case to the jury.

Affirmed.

---

3. The final judgment of the United States District Court for the Western District of Virginia (J.A. 69):

In The United States District Court

For The Western District Of Virginia

Charlottesville Division

Civil Action No. 71-C-6-C

Earl G. Paynter, Jr.,

v.

The Chesapeake and Ohio Railway Company,

Order

The defendant in this case, by counsel, has filed a motion pursuant to Rules 50 & 59 asking the court to set aside the verdict of the jury in this case and to enter final judgment in favor of the defendant or in the alternative, to grant the defendant a new trial.

The court having considered said motion, doth overrule the same, the effect of which is to re-affirm the judgment order heretofore entered by the court on November 28, 1973.

Enter: December 12, 1973

James C. Turk
Chief U.S. District Judge

Clerk's Office, U.S. Dist. Court
at Charlottesville, Va.
Filed December 13, 1973

Joyce F. Witt, Clerk

By: Virginia P. Harris
Deputy Clerk

A True Copy, Teste:
Joyce F. Witt, Clerk

By: Virginia P. Harris
Deputy Clerk

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4. The written ruling of the United States District Court for the Western District of Virginia of the motion to dismiss (J.A. 43-46):

Clerk's Office U.S. Dist. Court
at Charlottesville, Va.

Filed June 15, 1973

Joyce F. Witt, Clerk

By: /s/ Virginia P. Harris
Deputy Clerk

In The United States District Court
For The Western District Of Virginia
Charlottesville Division

Civil Action Number 71-C-6-C

Ruling On Motion To Dismiss

Earle G. Paynter,

Plaintiff,

vs.

Chesapeake and Ohio Railway,

Defendant.

* * *

Ruling On Motion To Dismiss

Plaintiff was injured on March 19, 1968. Plaintiff filed his suit on March 22, 1971. The time limit allowed under FELA is three years as required by 45 U.S.C.A. § 56. Rule 6 of the Federal Rules of Civil Procedure provides as follows:

> In computing any period of time prescribed or allowed by these rules, by local rules of any district court, by order of court, or by any applicable statute, *the day of the act, event, or default from which the designated period of time begins to run shall not be counted. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day, which is not a Saturday, a Sunday, or a legal holiday.* (Emphasis added)

Under Rule 6, the designated period of time did not begin to run until the date following the accident, March 20, 1968.

Three years from that date, March 20, 1971 fell on a Saturday, and the following day was Sunday. Therefore, the court finds that plaintiff's suit, filed on Monday, March 22, 1971, falls within the statutory three-year period.

It has been held that Rule 6 of the Federal Rules of Civil Procedure is applicable to pleadings and statutes of limitations and that in computing time the first day should be excluded and the last day included. *Miller* v. *Daybrook-Ottawa Corp.*, 291 F. Supp. 896 (1968).

In *Rutledge* v. *Sinclair Refining Co.*, 13 F.R.D. 477 (S.D. N.Y. 1953), the court said at 478 that "the basic issue is whether Rule 6(a) is applicable to a Federal statute of limitation when the last day of the period prescribed by it falls on a Sunday. (Rule 6 at that time did not include Saturdays). The court specifically held that the statute of limitations under FELA was controlled by the provisions of Rule 6 of the Federal Rules of Civil Procedure.

* * *

Accordingly, for the above-stated reasons, it is hereby ordered and adjudged that defendant's motion to dismiss on the ground of statute of limitations is overruled and denied.

* * *

Enter:

Ted Dalton
U.S. Chief District Judge

June 12, 1973

A True Copy, Teste:

Joyce F. Witt, Clerk

By: /s/ Virginia P. Harris
Deputy Clerk

SUPREME COURT, U. S.

MAR 4 19

MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

October Term, 1974

No 74-986

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Petitioner,

v.

EARLE G. PAYNTER, JR.,
Respondent,

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Willard J. Moody, Esq.
Raymond H. Stropie, Esq.
Moody, McMurran and Miller
P.O. Box 1138
Portsmouth, Virginia 23705
Counsel for Respondent

TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	1
QUESTIONS PRESENTED FOR REVIEW	2
STATEMENT OF THE CASE	2
ARGUMENTS	
I. Paynter's Suit Was Timely Commenced.	7
II. There Was Sufficient Evidence For The Jury To Pass On.	12
CONCLUSION	17
CERTIFICATE	17
APPENDIX	1A-6A

TABLE OF CITATIONS

Page

Federal Cases

Brennan v. Independent Lift Truck Builders Union, 490 F 2d 213 (7th Cir. 1973) 10

Johnson v. Flemming, 264 F 2d 322 (10th Cir. 1959) 10

Joint Council v. Delaware L. & W. R. Co., 157 F 2d 417 (2nd Cir. 1946) 12

McCracken v. Richmond, Fredericksburg and Potomac R. Co., 240 F 2d 484 (4th Cir. 1957) 16

Miller v. Daybrook-Octtavia Corporation, 291 F. Supp. 896 (M. D. Ohio 1968) 11

Pennsylvania Public Utilities Commission v. United States of America, 311 F. Supp. 1024 (M. D. Penn 1970) 11

Powell v. Kuel, 329 F. Supp. 193 (M. D. Penn 1971) 11

Rutledge v. Sinclair Refining Co., 13 F. R. D. 477 (1953) 9

Page

Sherwood Bros. v. District of Columbia, 113 F. 2d 162 (1940) 11

Simon v. Commissioner of Internal Revenue, 176 F 2d 230 (2nd Cir. 1949) 11

Smith v. Pasqualetto, 246 F 2d 705 (First Circuit 1957) 10

United States v. Cia Luz Stearica, 181 F 2d 695 (Ninth Cir. 1950) 11

United States v. Petees, 220 F 2d 554 (10th Cir. 1955) 10

Wilkes v. United States, 192 F 2d 128 (5th Cir. 1951) 10

Wirtz v. Peninsula Shipbuilders Association, 382 F 2d 237 (4th Cir. 1967) 10

State

Associated Transport v. Pusey, 118 A 2d 362 (Delaware 1955) 12

Bowling v. Webb Gas Company, Inc. of Lebanon, 505 S. W. 2d 39 (Missouri 1974) 12

Bremby v. Armdir and Company, 95 N. W. 2d 449 (Iowa 1950) 12

Page

Brown v. Porter, 163 N. W. 2d 709 (Michigan 1968) 11, 12

Hardbarger v. Deal, 127 S. E. 2d 771 (N. C. 1961) 12

Poetz v. Mix, 81 A 2d 741 (N. J. 1951) 12

Romaine v. State Farm Mutual Automobile Insurance Company 485 P 2d 102 (Nevada 1971) 12

Wooten v. State Compensation Comm., 95 S. E. 2d 643 (W. Va. 1957) 12

Supreme Court Cases

Bailey v. Central Vermont R. Co., 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1445 (1943) 15

Burnett v. New York Central Railroad, 380 U. S. 424, 85 S. Ct. 1050, 13 L. Ed. 2d 941 (1965) 10

Davis v. Virginia Railway, 361 U. S. 354, 80 S. Ct. 387, 4 L. Ed. 2d 366 (1960) 15

Page

Glus v. Brooklyn Eastern Terminal, 359 U.S. 231, 79 S. Ct. 760, 3 L. Ed. 2d 770 (1959) 10

Herb v. Pitcarin, 325 U.S. 77, 65 S. Ct. 954, 89 L. Ed. 1493 (1945) 10

Inman v. Baltimore and O. Ry. Co., 361 U.S. 138, 80 S. Ct. 242, 4 L. Ed. 2d 198 (1959) 16

Jones and Laughlin Steel Company v. Grideron Steel Company, 382 U.S. 32, 86 S. Ct. 152, 15 L. Ed. 2d 26 (1965) 9

Rogers v. Missouri-Pacific R. Co., 352 U.S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493 (1956) 14

Street v. United States, 133 U.S. 299, 10 S. Ct. 309, 33 L. Ed. 631 (1890) 9

Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 63 S. Ct. 444, 87 L. Ed. 610 (1943) 15

Union National Bank v. Lamb, 337 U.S. 38, 69 S. Ct. 911, 93 L. Ed. 1190 (1949) 8

Page

Urie v. Thompson, 337 U.S. 163, 69 S. Ct. 1018, 73 L. Ed. 1282 (1949) 8

Washington and G.R. Co. v. McDade, 135 U.S. 554, 10 S. Ct. 1044, 34 L. Ed. 235 (1890) 16

Webb v. Illinois Central Railroad Company, 352 U.S. 512, 77 S. Ct. 451, 1 L. Ed. 2d 503 (1957) 15

Wilkerson v. McCarthy, 336 U.S. 53, 69 S. Ct. 413, 93 L. Ed. 497 (1949) 16

Other Authorities

45 U.S.C. Section 56 9

28 U.S.C.A. 2101 (c) 9

Rule 6a - Federal Rules of Civil Procedure 2, 8, 9, 11

Rule 19B of the Rules of the Supreme Court of the United States 8

Rule 51 - Federal Rules of Civil Procedure 16

IN THE

SUPREME COURT OF THE UNITED STATES

No. 74-986

THE CHESAPEAKE AND OHIO
RAILWAY COMPANY,

Petitioner,

v.

EARLE G. PAYNTER, JR.,

Respondent.

Brief In Opposition To Petition For A Writ
Of Certiorari

PRELIMINARY STATEMENT[1]

This is a negligence case under the Federal Employers' Liability Act (FELA)[2]. It presents

[1]Petitioner, the Chesapeake and Ohio Railway Company, will be referred to throughout as the "C&O". Respondent, Earle G. Paynter, Jr. will be referred to throughout as "Paynter". Reference will be made to the joint appendix filed on appeal unless otherwise designated.

[2]45 U. S. C. 51 et seq

no legal questions not previously resolved, nor is there any dispute over the principles to be applied. The only question is the application of established principles and clearly defined rules to the facts of this case. Paynter respectfully submits that none of the reasons set forth in Rule 19B apply to this case and this Honorable Court should not grant a writ of certiorari.

II

QUESTIONS PRESENTED FOR REVIEW

1. Should this Court review a well settled principle that Rule 6a of the Federal Rules of Civil Procedure will extend a federal statute of limitation to a Monday when the statute of limitation expires on a Saturday?

2. Should this Court review the sufficiency of the evidence in a Federal Employers' Liability Act case where the District Court and the Fourth Circuit Court of Appeals properly concluded there was sufficient evidence of the C&O's negligence for the jury to pass on?

III

STATEMENT OF THE CASE

Paynter, a railroad employee with the C&O, filed a complaint in the United States District Court for the Western District of Virginia on Monday, March 22, 1971 against the C&O alleging injuries sustained on March 19, 1968 as a result of the C&O's negligence. Paynter's complaint was amended several times

one of which stated that Paynter did not have knowledge of his injury until March 20, 1968. The C&O filed an answer and a motion to dismiss alleging that Paynter's cause of action was barred by the FELA three year statute of limitation. The District Court then held a hearing on the motion to dismiss, and the C&O offered no evidence at this hearing. Paynter offered extensive evidence by way of depositions and Paynter's evidence was uncontradicted. The District Court held that Paynter's suit was timely commenced as a matter of law. (See entire written opinion of District Court Appendix 1a - 6a which the C&O failed to include in its petition for certiorari) The District Court concluded from the uncontradicted facts and evidence that the FELA three year statute of limitation did not run until March 20, 1971, a Saturday, and that since March 20th was a Saturday and the Clerk's Office was closed, that Paynter had until Monday, March 22, 1971, the next day which is neither a Saturday or Sunday to commence his action and that Paynter did commence his action by March 22, 1971. (See Appendix to this Brief, pages 1a-6a) The District Court made a specific factual finding that Paynter did not have knowledge of his injury until March 20th, 1968. The case was then set for a trial by jury.

The evidence showed that on March 19, 1968, Paynter was a yard conductor in charge of a crew making up a train called 95 West in the Smith Creek Yard in Clifton Forge, Virginia (120). Pullen was a brakeman (140), McCoy, a brakeman (140), and Fisher was the engineer (140). The crew was working the

7:00 A.M. to 3:00 P.M. shift.

The crew had been kicking cars into the number two track in order to make up the train known as 95 West (119, 120). The switch known as number one and two was lined up for the number two track (157). There was no need for Paynter's crew to throw the number one and two switch to the number one track (81, 95). However, there were several other crews working in the yard (88). All testimony indicated that switch number one and two had to be lined up with track number two in order to protect any train doubled over on track number one (94, 95, 131). When Paynter last noticed switch number one and two before a break, it was lined up with the track number two (157, 162). After a break, Pullen, the head brakeman, cut a car off from the engine into the number two track (144). Paynter was standing about 50 feet away from switch number one and two and saw that switch number one and two was set wrong as it was aligned with track number one (158). Paynter immediately went over to the switch to change it from number one to number two in order to prevent the car cut by Pullen from running into the train on track number one. Paynter had to jerk the switch to get it up (159) and felt a "thing" hit him in the back when he pushed the switch down to line it with the number two track (159). Evidence showed that Paynter did not know he was injured at this time. (See Appendix to this Brief, pages 1a-6a; see also 159, 163, 164, 177, 178, 182).

Paynter maintained that one of the members

of the road crew that brought in a long coal train pulled the wrong switch (157, 188). All members of Paynter's crew denied throwing the switch to the number one track.

Paynter stated that the switch didn't work in the usual manner (159), that there was sand and dirt in it (159) and that he had to jerk it to operate it (160). Other railroad employees agreed that if switch number one and two was not clean it would not operate right (122, 142). An accident report filed by Paynter the next day on March 20, 1968 when he realized he was injured indicated that the switch was defective (179). R. A. Wilson, a railroad employee, also indicated that switch number one and two was not working properly on March 19th, 1968 (150). Switch number one and two was in an improper working order at all times since the switch had to be jerked in order to reverse the movements of the switch points (137).

R. E. Johnson, a brakeman, who frequently worked at the Smith Creek Yard indicated that switch number one and two was unusual and the only switch of its kind in the Clifton Forge Yard (72). This switch had a bar parallel and just off the ground about two and one-half feet long with a metal ball on the end that weighed 12-15 pounds (72). All other switches at Clifton Forge had a lever that stood at a 45 degree angle with a latch that kept the switch points from moving (126, 127). Switch number one and two did not have a latch and the switch points were kept from moving by the weight of the metal ball (90). Johnson was of the opinion that switch number one and

two was harder to operate than the other switches in the yard with a latch (77, 84). Other witnesses agreed that switch number one and two was adjusted tighter than the latch switches in order to keep the switch points from moving and consequently was more difficult to throw (91, 95, 126, 149). In addition, the latch or raccor switches when contrasted with switch number one and two could be operated without bending all the way over (76, 90, 126).

Evidence also showed that the switches were only greased occasionally and then with a heavy oil which made things worse when sand got in it rather than being lubricated with graphite (86, 92, 93). Sand would get in the switches and the switches were not cleaned daily (87). It took about twenty-twenty-five minutes to clean a switch and the C&O had only three men available to clean over 250 switches in the yard.

The condition of switch number one and two was not new to the C&O. Johnson had complained about the condition of the switch to the yardmaster and trainmaster (79). Bocock had made complaints to the trainmaster about the mechanical condition of switch number one and two prior to March 19th, 1968 (93). Showalter, a union representative, had made complaints about the switch (128, 129). Ray Wilson had complained to his supervisors prior to March 19, 1968 that switch number one and two would hang (150). Paynter had reported to the yardmaster many times that the switch needed cleaning (161).

The jury found for Paynter and awarded him $125,540.00 in damages for his disabling injuries which injuries precluded Paynter from any future employment with the C&O. The court reduced the verdict of $125,540.00 to $100,432.00 which reduction was due to the jury finding Paynter contributorily negligent in the amount of twenty percent. The District Court overruled the C&O's motion for judgment notwithstanding the verdict and its motion for a new trial (Appendix B, see pages 20 and 21, petition for a writ of certiorari). The Fourth Circuit Court of Appeals in a per curiam opinion found no reversible error and found sufficient evidence to take the case to the jury (See Appendix B, page 19 of petition for a writ of certiorari). The C&O then sought to have a rehearing in banc which rehearing was denied on December 6, 1974 (See Appendix B, page 18 petition for a writ of certiorari). The C&O's petition for certiorari was filed in this Court on February 7, 1975.

IV

ARGUMENT

Paynter's suit was timely commenced.

The District Court found that the three year statute of limitation did not run until Saturday, March 20, 1971, which finding is not challenged by the C&O. The uncontradicted evidence at the hearing on the motion to dismiss showed that Paynter did not know he was injured until March 20th, 1968 and that Paynter's cause of action did not accrue until Paynter discovered his injury. (See Appendix to this

brief 1A-6A); see also Urie v. Thompson, 337 U.S. 163, 69 S. Ct. 1018, 73 L. Ed. 1282 (1949).

The C&O argues that this Court should grant certiorari because Rule 6a of the Federal Rules of Civil Procedure cannot extend the FELA three year statute of limitation to a Monday when the last day of the statute runs out on a Saturday or Sunday. Paynter respectfully submits that this issue has been decided by all levels of state and federal courts including this Court and is not an issue that would warrant this Court granting certiorari under Rule 19B of the Rules of the Supreme Court of the United States.

In Union National Bank v. Lamb, 337 U.S. 38, 69 S. Ct. 911, 93 L. Ed. 1190 (1949), the Supreme Court of the United States held that Rule 6a of the Federal Rules of Civil Procedure would extend beyond 90 days, the time for filing a petition for writ of certiorari when the last day fell on a Sunday. This Court held that the petition for certiorari was timely commenced by filing the petition on the 91st day because the language of Rule 6a provided that where the last day for performance of an act falls on a Sunday or a legal holiday, performance on the next day which is not a Sunday or legal holiday is timely commenced. (Note Rule 6a now covers Saturdays). The Court then discussed the purpose of Rule 6a and stated

> "that rule provides the method for computation of time prescribed or allowed not only by the rules or by order of court but by "any applicable statute" (Italics ours). Since the rule

had the concurrence of Congress, and since no contrary policy is expressed in the statute governing this review, we think that the consideration of liberality and leniency which find expression in Rule 6 (a) are equally applicable to 28 U. S. C. A. 2101 (c)". See Lamb, supra, 40, 41.

It is to be noted that Rule 6a was initially adopted by Congress in 1934 and was in affect when the FELA three year statute of limitation found in 45 U. S. C. Section 56 was adopted in 1939. Congress has expressed no contrary policy in 45 U. S. C. Section 56 which would preclude the application of Rule 6a of the Federal Rules of Civil Procedure. See 45 U. S. C. Section 56; See Lamb, supra; See Jones and Laughlin Steel Company v. Grideron Steel Company, 382 U. S. 32, 86 S. Ct. 152, 15 L. Ed. 2d 26 (1965) where this court held in a per curiam decision that a notice of appeal was timely filed on 32nd day when 30th day fell on a Saturday. See also Street v. United States, 133 U. S. 299, 10 S. Ct. 309, 33 L. Ed. 631 (1890). In Rutledge v. Sinclair Refining Co., 13 F. R. D. 477 (1953), a District Court held that Rule 6a is applicable to 45 U. S. C. Section 56 and held that a suit commenced on Monday was timely commenced when the statute of limitation expired on a Sunday. (Rule 6a did not cover Saturdays at that time). Of course, any other interpretation would reduce the limitation period to a period of less than three years which limitation would be contrary to 45 U. S. C. 56 and to the decisions of this court interpreting the humanitarian purposes of the Federal Employers' Liability

Act. See Burnett v. New York Central Railroad, 380 U. S. 424, 85 S. Ct. 1050, 13 L. Ed. 2d 941 (1965). See Glus v. Brooklyn Eastern Terminal, 359 U. S. 231, 79 S. Ct. 760, 3 L. Ed. 2d 770 (1959); See Herb v. Pitcarin, 325 U. S. 77, 65 S. Ct. 954, 89 L. Ed. 1493 (1945).

There is no conflict among the Circuit Courts on this issue. In Wilkes v. United States, 192 F 2d 128 (5th Cir. 1951), a federal statute required a suit to be instituted within two years for a tax refund. The two year period expired on a holiday and suit was filed on Monday. The Fifth Circuit in Wilkes, supra, held that Rule 6a applied to any applicable statute and extended the two year statute of limitation to Monday. The Fourth Circuit in Wirtz v. Peninsula Shipbuilders Association, 382 F. 2d 237 (4th Cir. 1967) held that a suit was timely commenced under the Labor Management Reporting and Disclosure Act where a suit had been filed on a Monday, one day after the 60 day statute of limitation period had run on a Sunday. The Seventh Circuit reached the same result in Brennan v. Independent Lift Truck Builders Union, 490 F 2d 213 (7th Cir. 1973). The Tenth Circuit held in Johnson v. Flemming, 264 F 2d 322 (10th Cir. 1959) that Rule 6a would extend the 60 day statute of limitation period which a social security applicant has to commence a suit in Federal Court. (See also United States v. Petees, 220 F 2d 554 (10th Cir. 1955) where Rule 6a will control any statute of limitation unless the statute of limitation provides otherwise). The First Circuit in Smith v. Pasqualetto, 246 F 2d 705 (First Circuit 1957) held that a negligence case was

timely commenced when the statute of limitation ran on a Sunday or legal holiday and the suit was commenced on a Monday. The Court of Appeals for the District of Columbia in Sherwood Bros. v. District of Columbia, 113 F 2d 162 (1940) held that under common law and Rule 6a a suit was timely brought on a Monday when the statute of limitation ran on a Sunday. See also Simon v. Commissioner of Internal Revenue, 176 F 2d 230 (2nd Cir. 1949); See United States v. Cia Luz Stearica, 181 F 2d 695 (Ninth Cir. 1950).

District Courts have ruled the same way. See Powell v. Kuel, 329 F. Supp. 193 (M. D. Penn 1971) where a District Court held that a suit commenced on a Monday was timely commenced under the one year statute of limitation act provided by the Food, Drug and Cosmetic Act where the statute of limitation ran on a Sunday. See Pennsylvania Public Utilities Commission v. United States of America, 311 F. Supp. 1024 (M. D. Penn 1970) where the District Court interpreted any applicable statute of Rule 6a to mean the time period in any statute that will be applied in an action in a District Court. See Miller v. Daybrook - Octtavia Corporation, 291 F. Supp. 896 (M. D. Ohio 1968) where the court held that Rule 6a is applicable to statute of limitation.

State Courts which have a similar statute or rule to Rule 6a of the Federal Rules of Civil Procedure have concluded that if the statute of limitation expires on a Saturday, Sunday or a holiday, a suit will be timely commenced if instituted on the next business day. See Brown v. Porter, 163 N. W. 2d 709

(Michigan 1968); See Romaine v. State Farm Mutual Automobile Insurance Company, 485 P 2d 102 (Nevada 1971); See Bowling v. Webb Gas Company, Inc. of Lebanon, 505 S. W. 2d 39 (Missouri 1974); Hardbarger v. Deal, 127 S. E. 2d 771 (N. C. 1961); Wooten v. State Compensation Comm., 95 S. E. 2d 643 (W. Va. 1957); Bremby v. Armdir and Company, 95 N. W. 2d 449 (Iowa 1950); Associated Transport v. Pusey, 118 A 2d 362 (Delaware 1955); Poetz v. Mix, 81 A 2d 741 (N. J. 1951).

The case of Joint Council v. Delaware L. & W. R. Co., 157 F 2d 417 (2nd Cir. 1946) cited by the C&O is not authority for saying that Rule 6a of the Federal Rules has no application to a statute of limitation because the Second Circuit concluded that the suit was timely commenced and did not hold that Rule 6a did not apply to a statute of limitation. The cases cited in the footnote of Lamb, supra, which the C&O uses to support its position were all decided before the adoption of Rule 6a and have been overruled or repudiated. Therefore, it is well settled through decisions of State Courts, District Courts, Circuit Courts and this Court that Rule 6a of the Federal Rules of Civil Procedure would extend a statute of limitation to a Monday if the last day expires on a Saturday or Sunday.

II. There was sufficient evidence for the jury to pass on.

The C& O has not accurately reported the facts and has failed to state the evidence and inferences therefrom in the light most favorable to Paynter, the verdict winner. Switch number

one and two was the only one of its kind in the Clifton Forge Yard where there were over 250 switches (72, 92). Switch number one and two was a ball type switch while all other switches in the yard were a raccor switch which could be handled in an upright position (126). Paynter testified that he had to jerk switch number one and two several times to get it up (159, 160), that the switch did not work in the usual manner (159), that the switch worked hard (159), and that there was sand in the switch (159, 160).

> Q. Now, you say you had to jerk it. Did the switch operate in the usual manner or did it not operate -
>
> A. No sir, it did not. It was sand in it and it worked hard, and I had to jerk it to get it up, and you had to get your feet on it to shut it down (159).
>
> Q. Now, did the switch come up or not when you pulled up on it?
>
> A. It come up but I had to jerk it up. It had sand and dirt in it (160).
>
> Q. Did it come all the way up or not?
>
> A. It come about half way up (160) --

A number of railroad employees confirmed the fact that switch number one and two would not work properly when there was sand in it (122, 142). Other testimony showed that the switch was in improper working order at all times because the switch had to be jerked to

reverse the switch points (137). R. A. Wilson, an employee of the C&O, stated that switch number one and two had a hang in it which prevented it from working properly (150). Evidence also indicated that switch number one and two was adjusted tighter than other switches and was difficult to throw (91, 126, 149). Other switches in the Clifton Forge Yard were kept from moving by a latch rather than a tight adjustment (126).

Evidence also showed that switch number one and two was not maintained properly. Switch number one and two was lubricated with a heavy oil instead of graphite (86, 92, 93). Testimony also showed that the switch had to be cleaned every day because sand got in it, that the C&O did not have sufficient men to keep the switches cleaned (92, 127, 128, 129) and there was sand in the switch at the time of Paynter's injury (159, 160).

In reviewing the sufficiency of the evidence of a Federal Employers' Liability case, the United States Supreme Court, in the landmark case of Rogers v. Missouri-Pacific R. Co., 352 U. S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493 (1956) held

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on

> grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury case is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights to make that appraisal and, if that test is met, are bound to find that a case for the jury is made whether or not the evidence allowed the jury a choice of other probabilities. The Statute expressly imposes liability on the employer to pay damages for injury or death "in whole or in part" due to its negligence." See Rogers, supra, at 506, 507. (Emphasis added)

A reading of the evidence and reasonable inferences therefrom shows there was sufficient evidence of the C&O's negligence to submit to the jury. See Webb v. Illinois Central Railroad Company, 352 U. S. 512, 77 S. Ct. 451, 1 L. Ed. 2d 503 (1957); See Davis v. Virginia Railway, 361 U. S. 354, 80 S. Ct. 387, 4 L. Ed. 2d 366 (1960). Reasonable or fair minded men could have concluded from the evidence that the C&O failed to provide Paynter with a reasonably safe place to work. Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610 (1943); See Bailey v. Central Vermont R. Co., 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1445 (1943);

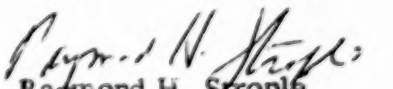
See Washington and G. R. Co. v. McDade, 135 U. S. 554, 10 S. Ct. 1044, 34 L. Ed. 235 (1890); See Wilkerson v. McCarthy, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497 (1949).

The C&O also argues that it was denied due process because of a number of prejudicial errors. Each of these errors were briefed and argued before the Fourth Circuit. In passing, it is to be noted that the C&O made no objection to the statements of Paynter's counsel in closing argument. The C&O made no objection to the charge of the court other than the charge was heavily weighted in favor of Paynter. Of course, this objection does not meet the requirements of Rule 51 of the Federal Rules of Civil Procedure. Paynter, in making a case to the jury, had to prove that the C&O knew or should have known of the condition of switch number one and two (56-59). The Court charged the jury that the only issue before it was whether Paynter had a reasonably safe place to work at the time of his injury and that Paynter had to prove that switch number one and two was in a defective condition at the time he was injured and not some other time either prior to or subsequent to his injury. (See Charge 49-65). Evidence of previous complaints about the switch and the length of time the switch was in an unsafe condition was relevant to the C&O's knowledge. See Inman v. Baltimore and O. Ry. Co., 361 U. S. 138, 80 S. Ct. 242, 4 L. Ed. 2d 198 (1959); McCracken v. Richmond, Fredericksburg and Potomac R. Co., 240 F 2d 484 (4th Cir. 1957).

CONCLUSION

The case was fully and fairly tried. There is no issue of national importance which would warrant this Court granting a writ of certiorari. The decision of the Fourth Circuit is consistent with the decisions of this Court and of other Federal Courts. This Court has long recognized that in a FELA case the jury is the tribunal to decide issues of fact where fair minded men could reach different conclusions. This Court should deny the C&O's petition for a writ of certiorari.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that three copies of the foregoing Brief were mailed to Aubrey R. Bowles, Jr. and Aubrey R. Bowles, III, 900 Mutual Building, Richmond, Virginia 23219, counsel for Petitioner, on the 3rd day of March, 1975.

Raymond H. Strople

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

EARLE G. PAYNTER, JR.,

Plaintiff,

vs. CIVIL ACTION 71-C-6-C

THE CHESAPEAKE AND OHIO
RAILWAY COMPANY,

Defendant.

Ruling On Motion To Dismiss

Plaintiff was injured on March 19, 1968. Plaintiff filed his suit on March 22, 1971. The time limit allowed under FELA is three years as required by 45 U.S.C.A. § 56. Rule 6 of the Federal Rules of Civil Procedure provides as follows:

> (52) In computing any period of time prescribed or allowed by these rules, by local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be counted. The last day of the period so computed shall be included unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day, which is not a Saturday, a Sunday, or a legal holiday. (Emphasis added)

Under Rule 6, the designated period of time did not begin to run until the date following the accident, March 20, 1968. Three years from that date, March 20, 1971 fell on a Saturday, and the following day was Sunday. Therefore, the court finds that plaintiff's suit, filed on Monday, March 22, 1971, falls within the statutory three-year period.

It has been held that Rule 6 of the Federal Rules of Civil Procedure is applicable to pleadings and statutes of limitations and that in computing time the first day should be excluded and the last day included. Miller v.

Daybrook-Ottawa Corp., 291 F. Supp. 896 (1968).

In Rutledge v. Sinclair Refining Co., 13 F.R.D. 477 (S.D. N.Y. 1953), the court said at 478 that "the basic issue is whether Rule 6 (a) is applicable to a Federal statute of limitation when the last day of the period prescribed by it falls on a Sunday. (Rule 6 at that time did not include Saturdays). The court specifically held that the statute of limitations under FELA was controlled by the provisions of Rule 6 of the Federal Rules of Civil Procedure.

The court also notes that plaintiff testified that although he was injured on March 19, 1968, he had no knowledge of his injury until March 20. Under FELA, a cause of action only accrues when the plaintiff has reason to know he is injured. The Supreme Court in Urie v. Thompson, 337 U.S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282 (1949) stated that statutes of limitations only require the assertion of claims within a specified period after notice of invasion of legal rights. This has been interpreted by the Fourth Circuit Court of Appeals as follows:

> The Urie case unquestionably demonstrates the Court's view that when the nature of the injury is such that it does not manifest itself immediately, the determination of when the cause of action accrued does not depend on when the injury was inflicted. To the contrary, (53) the cause of action accrues only when the plaintiff has reason to know he has

been injured. (Emphasis added) Young v. Clinchfield Railroad Co., 288 F. 2d 499, 503 (4th Cir. 1961)

The court notes that until the plaintiff knew that he was injured, he was legally ignorant of the existence of his alleged cause of action. Therefore, it may be said that the cause of action accrued on March 20, 1968, when the plaintiff first discovered his injury.

The defendant seeks dismissal because the claim arose more than three years prior to the filing of the amended complaint. The amended complaint was filed on July 24, 1972 and the injury was discovered on March 20, 1968. The Supreme Court has held that where an amendment merely expands or amplifies the cause of action already asserted, it relates back to the commencement of the action and is not affected by the intervening lapse of time. Seaboard Airline v. Renn., 241 U.S. 290, 36 S. Ct. 567, 60 L. Ed. 1006 (1916). This court notes that the amended complaint filed on July 24, 1972 merely expanded and amplified the original complaint of March 22, 1971 and therefore relates back to the commencement of the action.

The court notes that the FELA statute of limitations is not totally inflexible, but may be extended beyond three years. Burnett v. New York Central R.R., 380 U.S. 424, 85 S. Ct. 1050, 13 L. Ed. 2d 941 (1965); Mumpower v. Southern Railway Company, 270 F. Supp. 318 (W.D. Va. 1967). One of the well recognized exceptions which will toll the FELA statute of limitations is the

doctrine of estoppel. Glus v. Brooklyn Eastern District Terminal, 359 U. S. 231, 79 S. Ct. 760, 3 L. Ed. 2d 770 (1959). The general law is stated in 24 A L. R. 2d 1413, 1435:

> Actual fraud in the technical sense, bad faith, or an intent to mislead or deceive is not essential to create an estoppel against setting up the statute of limitations, it being sufficient for this purpose that the (defendant) made misrepresentations which misled the (plaintiff), who acted upon them in good faith, to the extent that he failed to commence action within the statutory period.

The facts appear in this case to indicate that the plaintiff was given assurances by three C&O doctors, Dr. Woodhouse, Dr. Edmonds and Dr. Vermilya that his injury was minor and that he could return to work. In (54) addition, a claims agent advised the plaintiff in June 1968 that he had three years within which to file his action.

The court feels that there remain factual questions as to the representations made to the plaintiff and to the issue of negligence, all of which may be submitted to the jury at the time of trial.

Accordingly, for the above-stated reasons, it is hereby ordered and adjudged that defendant's motion to dismiss on the ground of statute of limitations is overruled and denied.

The court is of the opinion that this decision and order entered herein involve a controlling question of law as to which there is a substantial ground for difference of opinion, and that an immediate appeal from the decision and order may materially advance the ultimate determination of this litigation, pursuant to the provisions of Title 28, U. S. C. sec. 1292 (b). An appeal is granted.

The clerk is directed to send a certified copy of this opinion to counsel of record.

Enter:

/s/ Ted Dalton
U. S. Chief District Judge
June 12, 1973

FILED
MAR 12 1975
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1974

No. 74-986

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Petitioner,

v.

EARLE G. PAYNTER, JR.,

Respondent.

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

This brief is filed pursuant to paragraph 4 of Rule 24 of this Court because Paynter raises new arguments not heretofore presented (Opposition Brief, pp. 2-3, 7) and because also of repeated misrepresentation of the evidence (pp. 3-6, 13-16).

THE RULING ON THE MOTION TO DISMISS

The Brief in Opposition (p. 3) states: "The District Court made a specific factual finding that Paynter did not have knowledge of his injury until March 20, 1964."

The record is as follows (J.A. 44-45):

> "The court also notes that plaintiff testified that although he was injured on March 19, 1968, he had no knowledge of his injury until March 20. Under FELA, a cause of action only occurs when the plaintiff has reason to know he is injured. * * *
>
> "The court notes that until the plaintiff knew that he was injured, he was legally ignorant of the existence of his alleged cause of action. Therefore, it may be said that the cause of action accrued on March 20, 1968, when the plaintiff first discovered his injury."

That conclusion of Judge Dalton on June 15, 1973 (J.A. 39-47) was based on the deposition of Paynter, taken September 25, 1972 (J.A. 21-22), the original complaint, par. 5, March 22, 1971 (J.A. 4),[1] paragraph 4 of the amended complaint of December 16, 1971 (J.A. 11),[2] and paragraph 4 of the second amended complaint of July 25, 1972 (J.A. 14)[3]

Paynter's answer to interrogatory 24, propounded to him on April 6, 1971 (J.A. 8, 10) and not answered until November 23, 1973 (J.A. 47, 49) was as follows:

> "24. Plaintiff first knew he was injured when treatment was first prescribed consisting of heat treatment on or about April 2, 1968."

At the trial before Judge Turk, however, when proof of the injury became most important to him, Paynter's testimony was directly contrary—that he had immediate knowl-

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[1] "5. That the plaintiff was not immediately aware that he had sustained an injury and continued with his work at that time."

[2] "* * *, and it was not until on or after March 22, 1968, that he knew he had sustained an injury on the occasion of March 19, 1968; * * *."

[3] "* * *, and it was not until after said date that he knew he had sustained an injury on the occasion of March 19, 1968; * * *."

edge of the alleged accident that occurred about 1 p.m. on March 19, 1968 (J.A. 162-163):

> "Along that evening about 2:30 I waited on a couple of cars down at the steel house and I stepped up to the door to step up to the steel house and the pain hit me again in the back and I just thought 'I hurt myself on that switch.' And Russell and John was on the other side of the track over there, and I said 'I hurt my back when I throwed that switch up yonder.' * * *
>
> "Anyway, I went on and we finished the day out ['til 3:00] and I went on home. I walked up on the hill, * * * and I just said, 'I know daggone well I hurt my back.' * * * I couldn't hardly sit down in the swing. * * *"

McCoy, a member of Paynter's crew, testified that Paynter told them right there that day that "he hurt his back when he throwed that number one switch" (J.A. 121).

Had Paynter so testified for Judge Dalton no issue would have been possible for him as to when the cause of action, if any, accrued and there would have been no opportunity then to argue, as there is no factual basis for doing so now, "that Paynter did not have knowledge of his injury until March 20, 1968" (Brief in Opposition, p. 3).

Similar disregard for fact permeates the Brief in Opposition in the same manner as was the situation during the trial, the understanding and control of which we again point out as indispensable to the fair trial required by due process.

RULE 6(a), FEDERAL RULES OF CIVIL PROCEDURE

The opinion of Justice Douglas in *Union National Bank v. Lamb*, 337 U.S. 38, 93 L.Ed. 1190, 69 S.Ct. 911 (1949) recognizes "the considerations of liberality and leniency" finding expression in Rule 6(a). Neither that opinion nor most of the Court of Appeals cited by Paynter expressly

consider the distinction between those procedural acts done before and those done "after the commencement of action" made by the Second Circuit in *Joint Council, etc. v. Delaware, L. & W. R. Co.*, 157 F.2d 417, 420 (1946).

The mere "concurrence of Congress" in the rule as a procedural regulation does not, we submit, express definite approval by the Congress of its application to acts done prior to the original initiation of the proceeding. On that specific point we urge decision.

THE MATERIAL INACCURACIES REGARDING THE EVIDENCE

R. A. Wilson could not have had knowledge to *indicate* "that switch number one and two was not working properly on March 19th, 1968 (150)," as stated at page 5 of the Brief in Opposition, because *Wilson did not work that day* (J.A. 152, 148):

> "Q. And you don't know what condition that switch was in on March 19th around one o'clock do you? A. I didn't work. I was swinging on Tuesday."

And Wilson also testified on direct examination, as did the other five trainmen called by Paynter, as follows (J.A. 149):

> "Q. Have you had occasion to use that same switch when it was cleaned and oiled properly? A. Yes sir.
>
> "Q. And how did it operate then? A. Fine."

The yard conductor, Showalter, former local chairman of the Brotherhood of Railroad Trainmen, relied on by Paynter to support the statement at page 5 of the Brief in Opposition that the switch "was in improper working order at all times," testified: that he knew nothing whatever about

the condition of the switch as to maintenance except on the night shift, 11:00 to 7:00, when it was not maintained in proper working order because it was cleaned on the first shift, 7:00 to 3:00, and not on his shift; and that he knew nothing about "whether it was clean, dirty, or otherwise at the time" of the alleged accident (J.A. 127, 132, 133). He also testified: "The switch, if kept clean, makes it much easier to manipulate and *it gives safety to the operation*" (J.A. 128, Italics supplied.).

Showalter complained about the switches in general on the second and third shifts, but definitely stated: "I cannot specify that I did about this particular switch" (J.A. 128-129). He was also unable to say that the switch in question was an "unsafe switch" (J.A. 133). He volunteered that his opinion about maintenance of the switches in general "could have been because of my [night] shift" (J.A. 137).

Showalter was also the yard conductor and former union chairman who testified concerning what Paynter admittedly did, allowed a car to be cut off to go into the number two track before making sure that the switch was properly aligned: "That isn't safe at all, no" (J.A. 135).

Paynter relies, page 6 of the Brief in Opposition, on brakeman Johnson to establish that "the switches were not cleaned daily (87)." Johnson was unable to recall whether he worked on March 19, 1968. He definitely did not know the condition of the switch on that day (J.A. 74, 86). Johnson worked the extra list and only worked "one or two or three shifts a week in this yard" (J.A. 78). His testimony on direct examination was like all the others (J.A. 78-79):

> "Q. * * *. If the switch was cleaned properly, have you had occasion to use it when it was cleaned properly; and if so, would it work as it should? [44] A. Yes, sir."

The C&O motion to strike Johnson's reply to the question whether the particular switch was cleaned daily, based on his prior testimony that he was not there but three times a week (J.A. 78), met the following response from Judge Turk (J.A. 87-88):

> "The Court: I'm not gonna strike it. I'm just gonna let the—it's up to the Jury to determine the weight of his evidence."

The quotation from Paynters' testimony at page 13 of the Brief in Opposition significantly omits the crucial next succeeding question and answer. That reply definitely establishes the total absence of any accurate knowledge by Paynter of the switch's condition when he ran over on March 19th, 1968 and grabbed to throw it in order to avoid the pending collision created by his own neglect (J.A. 160):

> "Q. And what happened? A. I had to jerk it to get it up—get the sand out of the switch, *I reckon*. It wouldn't go all the way down." (Italics supplied.)

That pure supposition is in complete accord with Paynter's own description of his sole truthful complaint about the switch during all the years in which it had caused no injury to anyone, as stated to his own counsel (J.A. 161):

> "It was in the same condition at all times. When it was full of sand, it was hard to throw."

That sole issue was without proof in this case except by speculation, conjecture and surmise—"*I reckon.*"

The number of switches and the number of men to clean them is totally irrelevant to whether this switch was cleaned on March 19, 1968, except for speculation and conjecture (Brief in Opposition, p. 14), in view of Paynter's own testimony that "Henry came over there every morning to

clean the switches" (J.A. 161). That fact was confirmed as a "daily routine" by his fellow employees called by him to testify (J.A. 147, 91, 133-134, 151, 152, 89).

It is also not true that "The C&O made no objection to the charge of the court other than the charge was heavily weighted in favor of Paynter," misstated at page 16 of the Brief in Opposition. There were in fact many objections (J.A. 236-238), the chief of which, carried also as a continuing objection throughout the trial (J.A. 74-75, 77-78, 87-88, 90-91, 216), was the refusal to confine and limit the issue and evidence to the condition of the switch at the time of the alleged accident on March 19, 1968. That important deficiency in the charge itself was definitely recognized by Judge Turk as an oversight on his part (J.A. 236). Notwithstanding that the condition of the switch on March 19, 1968 was admittedly "the sole issue in the case" (J.A. 217), the only specific reference to it in the charge was insufficiently added to the charge by the court as an admitted afterthought (J.A. 236, 64-65).

The trial court specifically did not charge the jury, as claimed at page 16 of the Brief in Opposition, that Paynter had to prove that the switch was defective at the time he was injured "and not some other time either prior to or subsequent to his injury." The trial court did the exact contrary. He expressly invited the jury to consider its condition both before and afterwards, admitted unlimited, irrelevant and immaterial testimony in that regard over a continuing objection thereto and specifically charged the jury to base its decisions on that evidence heard in the courtroom and the inferences therefrom (J.A. 74-75, 53, 54, 55).

THE NET RESULT

The Brief in Opposition further exemplifies the unsupported insinuation of fact contrary to the law and evidence that beguiled and misled the jury in this case, which the trial judge did not choose to control, and the effect of which the panel of the Fourth Circuit Court of Appeals failed to perceive. The petition for certiorari seeks the aid of this Court, as a last resort, to supervise and correct the result.

The C&O Railway was indeed entitled on the evidence, we submit, to final judgment in its favor by reason of the complete lack of proof that it failed to exercise ordinary care to provide a reasonably safe plan to work and reasonably safe equipment, the total limit of its obligation under FELA. In any event, however, a new trial on the admitted sole issue and upon evidence properly restricted to that issue is the only means by which it can otherwise obtain a fair determination whether it performed that obligation.

The result submitted to this Court proceeds from a growing tendency to construe the intention of Congress in adopting FELA, as Paynter's counsel told the jury: "We don't care. He is entitled to recovery" (J.A. 217). That trend is made possible by a combination of factors: (1) the reticence of qualified persons to serve as jurors; (2) the indisposition of trial judges to take charge of and control the trials and counsel before them; and (3) the failure of over worked appellate courts to give such perceptive study as will insure adequate comprehension of the questions presented.

The future of the administration of justice rests on a sufficient supervision by this Court of all three under the last clause of its Rule 19(b). Otherwise, we most respectfully submit, the following observation by the historian,

Theodor Mommsen, in his volume, *The History of Rome*, concerning the fall of the Republic, may also prove prophetic:

> "the blame rested jointly on all parties—magistrates, jurymen, litigants, even the public as spectators. But the most incurable wounds were inflicted by the lawyers. * * *
>
> "* * * But the sacred sense of right and the reverance for the law, which it is difficult to destroy in the minds of the multitude, is still more difficult to replace."

Respectfully submitted,

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Richmond, Virginia
March 11, 1975

CERTIFICATE

The undersigned certifies that three copies of the foregoing Reply, were mailed, postage prepaid, to Messrs. Willard J. Moody, and Raymond H. Strople, of Moody, McMurran and Miller, P.O. Box 1138, Portsmouth, Virginia 23705, Counsel for the Respondent, on March 11, 1975.

AUBREY R. BOWLES, JR.